DOCKET

4

PROCEEDINGS AND ORDERS DATE: 12/3/84

CASE NBR 83-1-06866 CFV
SHORT TITLE Means, Alvin DOCKETED: Apr 28 1984
VERSUS United States

Date	Proceedings and Orders
Apr 28 1984	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jun 13 1984	Waiver of right of respondent United States to respond filed.
Jun 21 1984	DISTRIBUTED. September 24, 1984
Aug 22 1984	Response requested. (Due September 21, 1984 - NOW RECEIVED)
Sep 19 1984	Order extending time to file response to petition until October 21, 1984.
Oct 18 1984	Brief of respondent United States in opposition filed.
Oct 25 1984	REDISTRIBUTED. November 9, 1984
Nov 13 1984	REDISTRIBUTED. November 21, 1984
Nov 26 1984	Petition DENIED. Dissenting opinion by Justice White with whom Justice Brennan joins. (Detached opinion.)

PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT FOR THE UNITED STATES
OCTOBER TERM 1963

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

vs. File No.

ALVIN MEANS,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI
FROM THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petitioner Pro Se
Appointed Counsel

Raymond G. Mullins P23101
Attorney for Defendant-Petitioner

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IN THE SUPREME COURT FOR THE UNITED STATES

UNITED STATES OF AMERICA,

Plaintiff-Respondent, File No._____

vs.

ALVIN MEADS, PETITION FOR WRIT OF CERTIORARI

Defendant-Petitioner.

_____/

NOW COMES defendant ALVIN MEADS by and through his attorney RAYMOND G. MULLINS and petitions this Court to review the Order of the United States Court of Appeals for the Sixth Circuit (case number 83-1276) which affirmed the judgment and conviction of conspiracy to possess with the intent to distribute and to distribute quantities of heroin contrary to 21 U.S.C. §841(a)(1) and 846 (Count I) and for distributing 1.86 grams of heroin in violation of 21 U.S.C. §841(a)(1) (Count II). See exhibit 1.

THE RULING BY THE Court of Appeals for the Sixth Circuit which affirmed the District Court is in error, because the ruling is contrary to the Law of the United States.

The Order of said Court of Appeals was entered February 28, 1984.

There are no dates respecting a rehearing or an extention of time within which to file the Petition for Certiorari.

Jurisdiction of the Court is conferred by 28 U.S.C. §1254(1) which provides that cases of the Court of Appeals may be reviewed by the Supreme Court by Writ of Certiorari granted upon Petition of any party to any criminal case after rendition of Judgment.

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals in affirming the District Court commit reversible error in denying defendant his right to confront all witnesses against as guaranteed to him by the 6th Amendment to the Constitution of the United States?

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Did the Sixth Circuit Court of Appeals in rendering its decision in the case conflict with its own decisions and decisions of other Federal Courts of Appeals regarding the same issues?

Did the Sixth Circuit Court of Appeals in rendiring its decision depart from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision?

Whether the Sixth Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be settled by this Court.

STATEMENT OF THE CASE

The facts of the case disclosed that defendant was tried by a jury in the United States District Court for the Eastern District of Michigan.

The Government presented evidence before the jury which disclosed the following:

In 1981 and 1982, Agent Dennis Schoenrock of the Drug Enforcement Administration was working in an undercover capacity with a confidential informant named Paul Charles. Charles, a heroin addict, was paid by the Government to make cases for the Drug Enforcement Administration.

During the trial, Paul Charles, testified over defendant's objections that sometime prior to December 4, 1981, Joseph Blotske , another heroin addict and alleged co-conspirator to defendant-petitioner, had told Charles he had access to heroin from two sources, Alfred Griggs, another named co-conspirator and defendant-petitioner who "sold about the best that was Around".

Charles further testified over defendant's objections that Blotske on December6, 1981 had told him that he had contected defendant had arranged to buy three grams of heroin the next day.

On December 7, 1981, Charles, Schoenrock and Blotske went

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to Means house. Blotske who had been given $700.00 by Schoenrock also approached Means' house and went in while Charles and Schoenrock waited outside about 100 feet from Means' house.

After an hour time Blotske, left defendant Means' house, met with Schoenrock and Charles some distance away from the house. Blotske at this time gave Schoenrock two tin foil packets of heroin and in return received an additional $1,100.00. Blotske then allegedly said he had to drop money off at Means' house. There was testimony that defendant had seen agent Schoenrock (and not Charles) from his house as Blotske left. There was no evidence corroborating the fact that Blotske received the heroin from defendant Means .

There was no evidence to establish that Blotske did not have the heroin on him prior to entering Means' home.

There was evidence by way of surveillance that Blotske did not return to Mean's home with the $1,100.00 as he said he was going to do.

There was no evidence other than the alleged hearsay testimony of Blotske, who was not at the trial and was a fugitive from the law at the time of the trial, that defendant ever sold heroin.

The only other evidence against defendant occurred when Paul Charles testified that in May 1981, a day after Charles and Schoenrock had gone to Mean's house, Means and Blotske came to Charles home. At this time Charles testified that Means' stated to Charles, "You brought a cop to my house, anything happens, you are dead".

Although agent Schoenrock had testified that he and defendant had seen each other on December 7, 1981 from a distance (100 feet more or less) there was no evidence to suggest that they had seen each other subsequent to that date.

Argument

Federal Rules of Evidence §801(d)(2)(e) specifically provides that statements of a co-conspirator are excluded

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from the definition of hearsay. However, before the Government can take advantage of the co-conspirator exception to the hearsay rule, it must show by a preponderance of the evidence that (1) a conspiracy existed, (2)that the defendant against whom the hearsay is offered was a member of the conspiracy and (3) that the hearsay statement was made in the course of and in furtherance of the conspiracy. United States v Vinson, 606 f.2d 149, 152 (6th Cir. 1979) following United States v Enright, 579 F2d 980 (6th Cir.1978).

Additionally, the rule in the 6th Circuit per Vinson, supra at 153, is that the hearsay statements themselves may be considered by the judge in deciding the preliminary question of admissibility.

The decision in the present case conflicts with the holding of the Supreme Court of the United States in United States v Glasser, 315 60 (1942) which held that a statement seeking admission cannot be considered at all in making the determination whether a conspiracy exist.. or in the alternative if such statments are admissible they should be given little weight. United States v Martorano, 557 1 (1st Cir. 1977). See also United States v Nixon, 418 U.S. 683, 701 n.14 (1974). In the present case, the Government's case was based entirely on the alleged co-conspirator statement of Blotske.

This decision of the Sixth Circuit Court of Appeals conflicts with its own holdings in Vinson supra, Enright, supra and United States v Arnott, 704 F2d 322, 325 (6th Cir. 1983). Each of these cases place their holdings on significant , independent non hearsay evidence in ruling on the admissibility of the co-conspirator's hearsay testimony.

This decision of the Sixth Circuit also conflictswith decisions of other circuits for the same reason. i.e., where preliminary rulings of the trial judge granted admissibility to co-conspirator hearsay statements, there has been substantial non-hearsay

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evidence introduced to show the existence of a conspiracy. See for example United States v Petroziello, 548 F2d 20 (1st Cir. 1977); United States v James, 590 F2d 575 (5th Cir. 1979).

While defendant recognizes that Rule 104(a) of the Federal Rules of Evidence permits the trial judge to base his determination of preliminary questions of fact on hearsay and other inadmissible evidence, United States v Petrozziello, supra, there is no standard as to how much weight should be given to the "bootstrap" hearsay evidence itself. Obviously the more weight given to the hearsay evidence in making such a determination, the more substantial constitutional rights of the accused are lost.

The basis of jurisdiction of the court of first instance is 18 U.S.C.§3231 which provides that the District Courts of the United States shall have original jurisdiction of all offenses against the law of the United States.

CONCLUSION

Accordingly, the Supreme Court needs to review the present case by granting a Writ of Certiorari to:

a. Determine whether the 6th Circuit Court of Appeals in affirming the trial court's preliminary ruling on admissibility of the co-conspirator's hearsay statements conflicted;

1. With its own decisions regarding the weight of non-hearsay evidence to be applied in such cases,

2. Decisions as to admissibility of other circuits, and/or

3. The guidelines established by decisions of Supreme Court of the United States.

b. To establish standards to be applied in like cases to assure that a defendant's rights to a trial by jury (including the right to confront witnesses against them) are not usurped by a preliminary ruling on admissibility by the trial judge.

Respectfully submitted,

Raymond G. Mullins P23101

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NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If a copy of this decision is not available, a request can be made to the Clerk of the Court. Any such citation should state whether the court to which it is addressed has a copy of the decision available.

. DESIGNATED FOR PUBLICATION

No. 83-1274

FILED
FEB 21 1984
JOHN P. HEHMAN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. ALVIN MEANS, Defendant-Appellant	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

Decided and filed_____

BEFORE: KEITH and KRUPANSKY, Circuit Judges; and WEICK, Senior Circuit Judge

PER CURIAM. Defendant-appellant, Alvin Means, appeals his conviction from the District Court for the Eastern District of Michigan for conspiracy to possess with the intent to distribute and to distribute quantities of heroin, a schedule I narcotic drug, contrary to 21 U.S.C. §§841(a)(1) and 846 (Count I) and for distributing 1.86 grams of heroin on December 7, 1981 in violation of 21 U.S.C. §841(a)(1) (Count II). Means was convicted by a jury on both counts on February 4, 1981 and subsequently sentenced to two concurrent terms of three years in the custody of the Attorney General, with a three year special parole term on Count II.

Means' primary assertion on appeal is that the district court erred in admitting into evidence statements made by his alleged co-conspirator, Joseph Blotnik, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence. Means alleges that the court should not have considered the hearsay statements themselves in determining whether such statements were admissible and

EXHIBIT I

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furthermore, that the admission of the co-conspirator statements violates the Sixth Amendment confrontation clause.

The pertinent facts indicate that in 1981 and 1982, Agent Dennis Schoenrock of the Drug Enforcement Administration (DEA) was working undercover with a confidential informant named Paul Charles. Charles, a heroin addict with contacts in the community of Hamtramck, Michigan, was paid to introduce Schoenrock to drug dealers as a prospective drug purchaser. Sometime prior to December 4, 1981, another heroin addict, Joseph Blotske, told Charles he had access to heroin and asked Charles to find out whether Schoenrock was interested in buying it. Blotske said he had two sources of heroin, Means and Alfred Griggs, but that Means "sold about the best that was around." On December 4, 1981, Blotske informed Charles that he had contacted Means and arranged to buy three (3) grams of heroin the next day.

On December 7, 1981, Charles and Schoenrock followed Blotske to Means' house. After receiving $700, from Schoenrock, Blotske approached Means house and went inside. Charles and Schoenrock waited outside and some distance away from Means' house so that Means would not know anyone else was in the area with Blotske. As Blotske was leaving, Schoenrock saw Means open the door and speak to Blotske; it appeared to Schoenrock that he had been seen by Means. Blotske got in his car and drove past Schoenrock and Charles, telling them that Means had seen them, but that he had denied he knew them.

Schoenrock and Charles, after waiting a short time, followed Blotske to a nearby parking lot where Blotske gave Schoenrock two six full packets of heroin and received an additional $1100. Blotske told the others to meet him in five or ten minutes at the Big Six Restaurant, explaining he had to drop the money off. In the restaurant, Blotske discussed his drug dealings, saying

he bought heroin and "whan", an animal tranquilizer used as a cutting agent, from Means.

Schoenrock did not have any further dealings with Means, however, in May, 1982, Blotske and Means visited Charles at which time Means stated to Charles, "You brought a cop to my house. Anything happens, you are dead."

Rule 801(d)(2)(E) specifically provides that statements of a co-conspirator are excluded from the definition of hearsay.[1] It is well established, however, "that, before the government can take advantage of the co-conspirator exception to the hearsay rebuff must show by a preponderance of the evidence (1) that a conspiracy existed, (2) that the defendant against whom the hearsay is offered was a member of the conspiracy and, (3) that the hearsay statement was made in the course of and in furtherance of the conspiracy." United States v. Vinson, 606 F.2d 149, 152 (6th Cir. 1979) cert. denied, 444 U.S. 1074 (1980), following United States v. Enright, 579 F.2d 980 (6th Cir. 1978). Additionally, the court in Vinson, supra at 153, noted that "the hearsay statements themselves may be considered by the judge in deciding the preliminary question of admissibility.

The existence of a criminal conspiracy need not be proven by direct evidence, a common plan may be inferred from circumstantial evidence. United States v. Luxenberg, 374 F.2d 141, 288 (6th Cir. 1967). The evidence produced during trial of the present case indicates that Agent Schoenrock gave Blotske $700 to purchase heroin from Means on December 7. He followed Blotske to Means'

---

1. Federal Rule 801(d)(2)(E) provides that:

> . . . (d) Statements which are not hearsay. A statement is not hearsay if--
> (2) Admission by party-opponent. The statement is offered by a party and is. . .
> (E) A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

house and saw him go inside. Subsequently, Schoenrock saw Means talking to Blotske on the porch and received two packages of heroin from Blotske a few minutes later. Moreover, Schoenrock was sure Means had seen him. Five months later, Means threatened Paul Charles with a gun because he had brought a "rep" to his house.

The facts set forth above when viewed in conjunction with the statements made by Blotske concerning Means participation in the alleged conspiracy sufficiently meets the preponderance test set forth in Vinson, supra and Enright, supra, for the admissibility of a co-conspirator's statements into evidence pursuant to Rule 801(d)(2)(E), Fed. R. Evid.

Additionally, the Sixth Circuit has consistently held that the admission of co-conspirator statements pursuant to Rule 801(d)(2)(E) Fed. R. Evid. does not violate a defendant's Sixth Amendment right to confrontation. United States v. Hamilton, 689 F.2d 1262, 1271 n. 5 (6th Cir. 1982), cert. denied, 103 S.Ct. 733 (1983); United States v. Kendricks, 623 F.2d 1165, 1167 (6th Cir. 1980); United States v. McManus, 560 F.2d 747, 750 (6th Cir. 1977), cert. denied, 434 U.S. 1047 (1978); United States v. Swanson, 568 F.2d 607, 661 (6th Cir. 1977), cert. denied, 431 U.S. 937 (1977).

Accordingly, the trial court did not err in admitting into evidence statements made by Blotske concerning Means' participation in the alleged conspiracy.

Means also asserts that the trial court erred in (1) refusing to declare a mistrial upon the government's failure to timely provide him with a laboratory report as required by the Jencks Act, 18 U.S.C. §3500, (2) refusing to conduct an in camera inspection of the governments evidence, and (3) allowing testimony concerning Alfred Griggs alleged participation in the conspiracy before the jury.

A review of the record, however, indicates that appellants claims are without merit. The district court correctly determined that the appellant was not prejudiced by the government's failure to provide appellant with a copy of the report. United States v. Bell, 613 F.2d 1555, 1558 (1st Cir. 1980), cert. denied, 446 U.S. 940 (1980).

Furthermore, the appellant failed to establish any basis requiring the district court to conduct an in camera inspection of all the government's evidence. United States v. Nickell, 552 F.2d 684 (6th Cir. 1977), cert. denied, 434 U.S. 984 (1978). Finally, in light of the limiting instruction given by the district court concerning any testimony proffered in regard to Alfred Griggs, no substantial rights of Means were affected. Berger v. United States, 295 U.S. 78, 86, 55 S.Ct. 629, 630, 79 L.Ed. 1314 (1935).

Accordingly, Means' conviction is AFFIRMED.

ISSUED AS MANDATE: March 21, 1984

COSTS: NONE

A TRUE COPY
ATTEST
JOHN P. HEHMAN, Clerk
By [illegible]
Deputy Clerk

United States District Court for the

ALVIN HEAGS

EASTERN DISTRICT OF MICHIGAN

DOCKET NO. 82-80320-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: March 31, 1983

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Raymond Mullins (Name of counsel)

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE, [X] NOT GUILTY

There being a finding/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY. as to Counts 1 and 2 of the Indictment.

Defendant has been convicted as charged of the offense(s) of conspiracy to possess with intent to distribute and to distribute heroin, in violation of 21USC:846 as charged in Count One; distribution of heroin and aiding and abetting in violation of 21:USC:841(a)(1) and 18:USC:2 as charged in Count Two of the Indictment.

The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

Three (3) years as to Count One; and Three (3) years as to Count Two with Three (3) years special parole. The sentence imposed on Count Two is to run concurrently with the sentence imposed on Count One.

The appearance bond is cancelled.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

James P. Churchill

March 31, 1983

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OPPOSITION BRIEF

ORIGINAL

No. 83-6066

Supreme Court, U.S.
FILED
OCT 18 1984
ALEXANDER L. STEVAS
Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

ALVIN MEARS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was sufficient evidence of the existence of a conspiracy to permit the admission of co-conspirator statements.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 83-6866

ALVIN MEADS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1984. The petition for a writ of certiorari was filed on April 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on one count of conspiracy to distribute heroin, in violation of 21 U.S.C. 846, and on one count of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two concurrent three-year terms of imprisonment and a three-year special parole term. The court of appeals affirmed in an unreported opinion (Pet. App. 1a-5a).

The evidence at trial established that in late 1981 Paul Charles, a heroin addict and Drug Enforcement Administration informant, approached another addict, Joseph Blotske, regarding the possibility of arranging a heroin purchase by his friend, Lonnie Schoenrock. Schoenrock was an undercover agent for the DEA. Tr. 29-31, 292-293. Blotske stated that he had two heroin suppliers, petitioner and Alfred Briggs, but that petitioner sold better quality heroin (Tr. 34). On December 6, 1981, Blotske reported that he had arranged to buy three grams of heroin from petitioner (Tr. 35-37, 40).

The next day, Charles went to Blotske's house. Blotske made a phone call and reported that he had arranged a meeting with petitioner at 1:30 p.m. Blotske and Charles met Schoenrock at a restaurant. Schoenrock entered Charles's car and they followed Blotske. Tr. 37-43, 295. Blotske stopped to make another phone call and reported that the heroin supplier wanted him to buy needles and syringes on the way (Tr. 295). While they were stopped at a drug store, Blotske asked for a $700 advance on the $1,800 purchase price. Schoenrock refused but agreed to turn over the advance when they got to the vicinity of petitioner's house. Tr. 295-297.

Charles and Schoenrock followed Blotske to the area of petitioner's house. After receiving $700 from Schoenrock, Blotske then drove on to petitioner's house and went inside. Meanwhile, Schoenrock stood in front of Charles's car so as to have a better view of the entrance to petitioner's house. As Blotske was leaving, Schoenrock saw petitioner open the door and speak to Blotske. It appeared to Schoenrock that he had been seen by petitioner. Blotske entered his car, and as he drove by he stated that petitioner had seen Schoenrock and Charles but that Blotske had denied knowing them. Tr. 300. Schoenrock and Charles followed Blotske to a nearby parking lot, where they exchanged two six foil packages of heroin (1.84 grams) for $1,700 (Tr. 276, 301-305). Blotske met with them again a few minutes

later at a restaurant and stated that petitioner regularly sold him both heroin and "whan," an animal tranquilizer used as a cutting agent (Tr. 305).

Schoenrock endeavored without success to have Blotske arrange another heroin purchase from petitioner. In January 1982, repeated allegations were circulating that Charles was an informant. In addition, Blotske sold Schoenrock some sham heroin. Tr. 278, 314-315, 329-331. This forced Schoenrock to cease dealing with Blotske because his cover as an addict would be destroyed if he continued to deal with a supplier who had cheated him (Tr. 341).

In May 1982, Charles took Schoenrock to petitioner's house to inquire about some jewelry he had sold to petitioner through Blotske. Schoenrock hoped to arrange a face-to-face heroin sale from petitioner, but a woman answered the door and stated that petitioner was not home (Tr. 68-69, 342-343). The following night, Blotske went to Charles's house and asked him to come out to Blotske's truck. Petitioner was behind the wheel, and Charles got into the truck (Tr. 69). While driving, petitioner asked Charles if he could sell 15,000 dilaudids and talked generally about drugs, including his ability to supply any drug Charles might want (Tr. 70-71). Petitioner then pulled over on a deserted street and asked Charles why he had come to petitioner's house. Petitioner had a gun in his lap and stated, "You brought a cop to my house. Anything happens, you are dead." Tr. 72. Charles then got out of the truck and walked home (Tr. 72).

2. Prior to admitting any hearsay testimony, the district court heard the government's proffer of its non-hearsay evidence regarding the existence of a conspiracy between Blotske and petitioner. The district court then ruled that the hearsay statements would be admitted conditionally (Tr. 22-27). At the close of the government's case, the court ruled that the existence of the conspiracy had been established by a preponderance of the evidence (Tr. 496-501). The court of

appeals affirmed, holding that the non-hearsay evidence "when viewed in conjunction with the [hearsay] statements by Blotske concerning [petitioner's] participation" established the existence of the conspiracy by a preponderance of the evidence (Pet. App. 4a).

ARGUMENT

Petitioner contends (Pet. 3-5) that the district court erroneously permitted hearsay declarations of an alleged coconspirator to be considered in determining whether the government had met its preliminary evidentiary burden of establishing the existence of the conspiracy. Petitioner's claim does not warrant review by this Court.

The Sixth Circuit has held that Fed. R. Evid. 104(a) modifies prior law and permits a trial court to give some consideration to the substance of an alleged coconspirator's declaration in determining whether the factual predicate for admission of coconspirator statements has been met. United States v. Arnott, 704 F.2d 322, 325 (6th Cir.), cert. denied, No. 82-2028 (March 31, 1983); United States v. Cassity, 631 F.2d 461, 464 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980); United States v. Enright, 579 F.2d 980, 985 n.4 (6th Cir. 1978). Other authority supports the Sixth Circuit's analysis of the effect of Rule 104(a). United States v. Mariorano, 561 F.2d 406 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978); United States v. Crespo, 490 F. Supp. 1234, 1241 (D. N.J.), aff'd 636 F.2d 1211 (3d Cir. 1980); Weinstein on Evidence, ¶104[05] at 104-144. However, the Sixth Circuit's position is still the minority view. See United States v. Arnott, No. 82-2028 (March 31, 1983) (Justice White dissenting from denial of certiorari).

In this case, the district court (Tr. 483-501) and the court of appeals (Pet. App. 3a-4a) placed some reliance on Blotske's statement that petitioner was his source for heroin. In so doing, however, the courts below did not allow hearsay to lift itself by its own bootstraps to the level of non-hearsay

evidence. Glasser v. United States, 315 U.S. 60, 74-75 (1942). Rather, they merely considered "the independent evidence in light of the color shed upon it by the highly trustworthy and reliable portion of the hearsay utterance seeking admission." United States v. Mariorano, 561 F.2d at 408. Such limited consideration of the hearsay statement was appropriate, just as it is appropriate under Rule 104(a) for courts to consider hearsay in making other determinations regarding the admission of evidence. See United States v. Matlock, 415 U.S. 164, 175 (1974). And, in any event, there is no greater need for review of the Sixth Circuit's approach in this case than there was in the cases previously noted where review was denied.

While the Sixth Circuit's interpretation of Rule 104(a) differs from that of other courts of appeals, the decision below does not conflict with that of any other circuit because it is clear that under any circuit's analysis the non-hearsay evidence alone was more than sufficient to establish that petitioner and Blotske were involved in a conspiracy to distribute narcotics. The nonhearsay evidence regarding the December 7, 1981, heroin sale provided strong circumstantial evidence that petitioner was the source of Blotske's heroin and that he was Blotske's coconspirator. If there was any doubt about this, it was erased by Charles's testimony regarding his subsequent encounter with petitioner and Blotske. On that occasion, Blotske came to Charles's house at night and said that he wanted to talk. They then entered a truck. Petitioner was behind the wheel and began driving. In Blotske's presence, petitioner asked Charles if he could sell 15,000 dilaudids, and petitioner told Charles that he could obtain any type of drugs that Charles might want. Petitioner also threatened Charles, saying, "You brought a cop to my house. If anything happens you are dead." These admissions (Fed. R. Evid. 801(2)(A)) provided more than sufficient evidence of petitioner's criminal association with Blotske and his role as a source for narcotics. Any ambiguity regarding the prior heroin

transaction was thereby eliminated. United States v. Falcone, 681 F.2d 214, 217 (4th Cir. 1982). Accordingly, it is clear that under the law of any circuit there was a preponderance of non-hearsay evidence establishing petitioner's participation in the conspiracy to distribute heroin. Thus, this case is not a proper vehicle for resolving any disagreement on this issue among the circuits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1984

OPINION

SUPREME COURT OF THE UNITED STATES

ALVIN MEANS *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARVIN ROTH *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 65-6966 AND 66-405. Decided November 28, 1966

The petitions for writs of certiorari are denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN joins, dissenting.

These cases raise three recurring issues regarding the administration of the co-conspirator exception to the hearsay rule.[1] Federal Rule of Evidence 801(d)(2)(E) provides that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy," when offered against that party, is not hearsay. The rule has given rise to confusion among the lower courts with regard to when, by what standard of proof, and in light of what evidence the trial court should determine whether the necessary conspiracy existed.

In No. 65-6966, a critical prosecution witness testified to incriminating statements made to him by petitioner's co-conspirator. The Sixth Circuit held that these statements were properly introduced pursuant to Rule 801(d)(2)(E). It concluded that the independent evidence, "when viewed in con-

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[1] The petitions do not raise a fourth issue that has split the Courts of Appeals, *viz.*, whether a co-conspirator's statement that is admissible under the Federal Rules automatically satisfies the requirements of the Confrontation Clause of the Constitution. *See Dutton v. United States*, — U. S. — (1966) (WHITE, J., dissenting from denial of certiorari); *see generally United States v. Ammons*, 714 F. 2d 238, 254–257 (CA3), *cert. denied*, — U. S. — (1965).

junction with the [hearsay] statements by Blotzke concerning [petitioner's] participation," established the existence of a conspiracy by a preponderance of the evidence. Pet. for Cert. 9. Thus, the Court of Appeals relied on the challenged statements to support the existence of the conspiracy pursuant to which those statements were introduced.

This approach was first adopted by the Sixth Circuit in *United States* v. *Vinson*, 606 F. 2d 149, 153 (1979), cert. denied, 444 U. S. 1074 and 445 U. S. 904 (1980), and has been approved en banc, *United States* v. *Pinzon*, 728 F. 2d 1234, 1240 and n. 1 (1983) (en banc), cert. denied, —— U. S. —— (1984). Though not entirely without support,[1] it is inconsistent with the stated position of every other Federal Court of Appeals. *See United States* v. *Jackson*, 627 F. 2d 1198, 1214–1215 (CADC 1980); *United States* v. *Nardi*, 633 F. 2d 972, 974 (CA1 1980); *United States* v. *Alvarez-Porras*, 642 F. 2d 54, 56–57 (CA2), cert. denied, 454 U. S. 839 (1981); *Government of the Virgin Islands* v. *Dowling*, 633 F. 2d 660, 665 (CA3), cert. denied, 449 U. S. 960 (1980); *United States* v. *Crooks*, 632 F. 2d 1120, 1131–1132 (CA4 1980); *United States* v. *James*, 590 F. 2d 575, 580–581 (CA5) (en banc), cert. denied, 442 U. S. 917 (1979); *United States* v. *Rapilio*, 669 F. 2d 1169, 1174 (CA7 1981), cert. denied, 457 U. S. 1133 (1982); *United States* v. *Bell*, 573 F. 2d 1040, 1043–1044 (CA8 1978); *United States* v. *Miranda-Uriarte*, 649 F. 2d 1345, 1349 (CA9 1981); *United States* v. *Andrews*, 585 F. 2d 961, 964–967 (CA10 1978); *United States* v. *Monsoor*, 702 F. 2d 980, 979–980 (CA11 1983). I have noted this conflict before, *see Arnott* v. *United States*, —— U. S. —— (1983) (WHITE, J., dissenting from denial of certiorari), and remain convinced that this Court should resolve it.

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[1] *See United States* v. *Martorano*, 561 F. 2d 498, 499 (CA1 1977), cert. denied, 436 U. S. 922 (1978); *United States* v. *Cryan*, 490 F. Supp. 1234, 1241 (NJ), aff'd, 638 F. 2d 1211 (CA3 1980); J. Weinstein and M. Berger, Weinstein's Evidence ¶ 104[10], p. 104–44 (1982).

Whether the Eighth Circuit belongs in the above list is in some doubt in light of the record of these petitions. The petitioner in No. 84–608 was convicted of extortion. The critical evidence was testimony by the victim about threatening phone calls he received from petitioner's co-conspirator. The District Court first admitted the statements conditionally, then, after the close of evidence, ruled that they were admissible. The Court of Appeals found that the statements were properly admitted. The court stated that the existence of a conspiracy must be established by independent evidence. Yet it relied on one of the threatening phone calls, this one from an uncertain source, to establish the date that the conspiracy had begun. App. to Pet. for Cert. A–12. Petitioner argues, with some force, that this use of the hearsay statement is inconsistent with the prevailing requirement of independent evidence.

The petitioner also raises two other issues as to which there is some division among the lower courts. First, he objects to the timing of the ruling on admissibility, arguing that admissibility should be established at a pretrial hearing rather than at the close of evidence. Second, he notes the existence of a conflict as to the standard of proof by which the conspiracy must be established. The majority position requires a preponderance of the evidence. *See United States* v. *Ammar*, 714 F. 2d 238, 249–251 (CA3), cert. denied, —— U. S. —— (1983); *United States* v. *Peterson*, 611 F. 2d 1313, 1327 (CA10 1979), cert. denied, 447 U. S. 905 (1980); *United States* v. *Jefferson*, 714 F. 2d 689, 696 (CA7 1983); *United States* v. *Bell*, *supra*, at 1044; *United States* v. *Arnott*, 704 F. 2d 322, 325 (CA6 1983), cert. denied, —— U. S. —— (1983). Other courts require only substantial evidence, *United States* v. *Jackson*, *supra*, at 1219–1220; *United States* v. *James*, *supra*, at 580–581; *United States* v. *Monsoor*, *supra*, at 976–980; or a prima facie case, *United States* v. *Dixon*, 562 F. 2d 1138, 1141 (CA8), cert. denied, 435 U. S. 927 (1977);

United States v. *Klein*, 600 F. 2d 147, 153–154 (CA8 1979), cert. denied, 449 U. S. 821 (1980).

The timing issue does not merit our review.[1] The question of the standard of proof does, but neither of these cases would be an appropriate vehicle as in each the Court of Appeals applied the most stringent alternative.[2] These cases are nonetheless reminders of the continuing confusion about the administration of the coconspirator exception—a confusion that, I think, we will eventually have to settle.

The critical question is whether a court may rely on challenged hearsay statements to determine whether the factual predicate for their admission exists. This Court has consistently denied certiorari in cases from the Sixth Circuit raising this issue. *Vinson* v. *United States*, 446 U. S. 1974 (1980); *Arnott* v. *United States*, —— U. S. —— (1982); *Shores* v. *United States*, —— U. S. —— (1984); *Pinnix* v. *United States*, —— U. S. —— (1984). The conflict shows no sign of disappearing, and I remain convinced that this Court should resolve it.

I dissent from the Court's denial of certiorari in these two cases.

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[1] Though some courts have indicated a preference for pretrial hearings, *e. g.*, *United States* v. *James*, 590 F. 2d 575, 581–582 (CA5 en banc), cert. denied, sub nom. *Nixon* v. *United States*, 442 U. S. 917 (1979), none has required them. There is general agreement that the district court has the discretion to admit coconspirator's statements conditionally prior to proof of the existence of a conspiracy. See *James*, *supra*, at 579; 1 J. Weinstein & M. Berger, Evidence ¶ 104–41 (1975).

[2] But see *United States* v. *Vinson*, 606 F. 2d 149, 153 (CA6 1979) (requiring proof by clear and convincing evidence); *United States* v. *Petrozziello*, 548 F. 2d 20, 23 (CA1 1977) (requiring proof by a preponderance of the evidence); *United States* v. *Bell*, 516 F. 2d 113, 118 (CA2 1975) (requiring proof by a preponderance of the evidence); *United States* v. *Nixon*, 504 F. 2d 478, 484 (CADC 1974) (requiring proof beyond a reasonable doubt); *United States* v. *Petersen*, 487 F. 2d 1357, 1360 (CA7 1973) (requiring proof by clear and convincing evidence); *United States* v. *Bourjaily*, 781 F. 2d 1329, 1335 (CA8 1986) (requiring proof by a preponderance of the evidence, on the basis of both hearsay and nonhearsay).